Supreme Court, U.S.
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No. 01-0319

In The

Supreme Court of the United States

TISBURY TOWING & TRANSPORTATION CO., INC.,
f/k/a PACKER MARINE, INC.,

Petitioner,

v.

TUG VENUS and TUCKER-ROY
MARINE TOWING & SALVAGE, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the burden of production shift to Respondent because it did not report the grounding of Tug VENUS as required by 46 C.F.R. § 4.05-1 (1988)?

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BRIEF IN OPPOSITION

Tug VENUS and its owner, Tucker-Roy Marine Towing & Salvage, Inc., Respondents herein, submit their Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Tisbury Towing & Transportation Co., Inc., f/k/a Packer Marine, Inc., to review the judgment of the United States Court of Appeals for the First Circuit. For the reasons set forth herein, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

For the purposes of this Brief in Opposition, Respondent adopts and incorporates by reference the relevant facts set forth in the reported opinion rendered by the United States Court of Appeals for the First Circuit, decided June 5, 2001, in *Tisbury Towing & Transportation Co. v. Tug VENUS and Tucker-Roy Marine Towing & Salvage, Inc.*, 251 F.3d 298 (1st Cir. 2001). The decision is reprinted in Appendix A to the Petition for Writ of Certiorari, Pet. App. A at 1a-8a. Respondents also rely upon the factual findings contained in the unpublished decision of the district court that is reproduced in Appendix B to the Petition, Pet. App. B at 9a-20a.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. This Case Does Not Meet the Criteria For Review By This Court.

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court of the United States, Rule 10. Although not exhaustive, Rule 10 lists a number of considerations governing the grant of a petition for writ of certiorari. Specifically, the Court may decide to undertake review if:

(a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

> conflicts with relevant decisions of this Court.

Id. None of the above is present in the instant case.

Firstly, further review of this matter is not justified under Rule 10(a) because the First Circuit decision is not in conflict with the Second Circuit's opinion in *Sternberg Dredging Co. v. Moran Towing & Transportation Co., Inc.*, 196 F.2d 1002, *reh'g denied per curiam*, 200 F.2d 603 (2d Cir. 1952). When the district court concluded that Petitioner had not satisfied its burden of proving that the stipulated grounding of the Tug VENUS had taken place on June 15, 1994, an essential fact upon which Petitioner conceded its theory of causation depended, Petitioner shifted its approach. As discussed in more detail below, Petitioner's reliance on *Sternberg* to foist the burden of producing evidence onto Respondents as to the date of the tug's grounding is a misapplication of that holding to the facts where, as here, Petitioner failed to introduce sufficient, credible evidence below to establish the elements of a *prima facie* case, to wit: the time, place, and cause of the damage to the ALGOL 500. Pet. App. B at 19a-20a. Without these predicate facts, the *Sternberg* decision has no application whatsoever to the distinguishable set of facts presented below. See Pet. App. A at 7a.

Secondly, review of the First Circuit's decision is not warranted under Rule 10(b) because Petitioner does not seek review of a state court opinion.

Thirdly, and more to the point, the decision below does not deviate from or otherwise conflict with this Court's long-standing decision in *Stevens v. The White City*, 285 U.S. 195 (1932), so as to compel review under

Rule 10(c). As outlined below, the district court correctly applied the elements of *Stevens* by requiring Petitioner to establish the necessary elements of a *prima facie* case. Pet. App. B at 15a. (*citations omitted*).

Finally, the fact that the Petition does not present a novel legal issue or an aberration of settled law militates against further review. The First Circuit's decision does not break any new ground; instead it applies the established framework enunciated by this Court in *Stevens* to the facts of the present case.

For these reasons, there are no compelling considerations that warrant review by this Court.

B. The First Circuit's Decision is Consistent with Supreme Court Jurisprudence and Decisions of Other United States Court of Appeals.

Recognizing *Stevens* as the seminal case concerning a tug's duty to its tow, both the district court and First Circuit properly rejected Petitioner's claim that Respondents should bear the burden of production as to when the grounding incident occurred. 251 F.3d at 300-01, Pet. App. A at 7a; Appendix B at 15a. In denying Petitioner's appeal, the First Circuit addressed this issue squarely:

> Packer does not point us to, and we have been unable to locate, *any* case standing for the proposition that a defendant's failure to report an accident has any effect on the allocation of burdens. Packer does cite to *Sternberg Dredging Co. v. Moran Towing & Transp. Co.*, 196 F.2d 1002 (2d Cir. 1952) (L. Hand, J.), for the proposition that: "It is often a controlling factor in deciding

> where to throw the burden of producing evidence . . . that the proper party to charge is he who alone could discover the truth." *Id.* at 1006. But taken in isolation that proposition is clearly an overstatement. *See Stevens v. The White City*, 285 U.S. 195, 202-03 (1932) (holding that, as to allocation of burdens, it is not "material that the facts of the case, and the causes of the collision, are peculiarly within the knowledge of the respondents. . . . We are not aware [ ] of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties." (internal quotation marks omitted)).

251 F.3d at 300-01, Pet. App. A at 6a-7a. (*emphasis added*). Thus, since 1932, this Court has held clearly and unequivocally that a bailment does not arise from a towage contract, *Stevens*, 285 U.S. at 200, and that the owner of a tow has the burden of proving that the negligence of the tug caused injury to the tow. *Id.*

Petitioner's half-hearted attempt to introduce elements of unfairness and prejudice into these proceedings is disingenuous. Pet. at 12, fn. 3. The undisputed evidence below is that Petitioner received information that the VENUS might have run aground with one of its barges from a third-party towing company in August of 1994, not more than two months after the stipulated grounding. App. A at 1-3. Petitioner also received similar information from at least two other sources. App. A at 3-7. Notwithstanding the possibility that one of its barges might have grounded, Petitioner did not question Respondent owner or any member of the VENUS' crew about the purported incident. App. A at 7-8. Nor did

Petitioner cause an inspection of its own fleet to determine whether any of its barges had been damaged. App. A at 8.

While Respondents were admittedly in the best position to document this incident, Petitioner was not too far behind. By its own inaction, Petitioner's effort to now claim prejudice as a result of Respondents' failure to report the tug's grounding must fail.[1]

C. The Underlying Issues and Facts of this Matter are Narrowly Confined and are Not Likely to Have Continuing Future Consequences.

In its conclusion, Petitioner argues that the First Circuit's ruling will discourage the reporting of marine casualties, albeit statutorily required, all to the detriment of maritime commerce and safety. Pet. at 19. Petitioner greatly exaggerates the significance of the First Circuit's decision which in no way alters or changes prospectively the statutory reporting requirements as they now appear at 46 C.F.R. §-4.05-1. In reality, the case below presented ordinary issues of negligence in the context of a towage relationship. In the end, it was a case of causation, pure and simple, with little impact on admiralty jurisprudence.

---

[1] Respondent owner's failure to comply with the reporting requirements of 46 C.F.R. § 4.05-1 (1988) is irrelevant to the Petition because the regulation did not require Respondent owner or the Coast Guard to notify Petitioner of the casualty once reported. The cases cited by Petitioner are inapposite. Pet. at 3.

After considering the relevant facts and the applicable law, the First Circuit properly held that Petitioner did not cite to any controlling authority to buttress its proposition that Respondent's failure to report the tug's grounding should shift the burden of production as to when the incident occurred. This case raises no other significant issue of admiralty law that warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PACKER MARINE, INC.,	*	
Plaintiff	*	
vs.	*	CIVIL ACTION
	*	No. 97-11392-RGS
TUG VENUS, *in rem*, and	*	
TUCKER-ROY MARINE TOWING & SALVAGE, INC., *in personam*	*	
Defendants	*	

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
BENCH TRIAL, DAY 1
May 10, 1999

* * *

[33] Q Now, had you heard anything prior to your conversation with Mr. Roy about a grounding on Middle Ledge?

A Yes, I had.

Q What had you heard?

A We do a great deal of work with Olmsted Marine in Woods Hole. It has a launch service, light towing service.

Kit Olmsted calls us from time to time, discusses the world, and he –

Q What do you mean he discusses the world?

A Pardon.

Q What do you mean that he discusses the world?

A Well, everything that happens in Woods Hole and thereabouts, and in conversation he said, I heard that Conrad Roy was on Middle Ledge with the barge.

And I said, Well, I don't know anything about it, or this or that.

And I said, If he had been on Middle Ledge with one of our barges, he would have told us.

[34] And that really kind of ended the conversation with Kit Olmsted. We went on to other things that we were supposed to be doing and didn't concentrate on everything that happens in Woods Hole.

Q Now, did you – how did Mr. Olmsted end the discussion on this incident?

A He said, "You didn't hear is [sic] from me."

Q What did you understand him to mean by that?

A Well, it's a – there's a lot of words that pass by and a lot of stories and a lot of events, and I think he was trying to be helpful, but then he realized that maybe he wasn't helpful and ended the conversation.

Q So did you rely on this information or that conversation that was provided to you by Mr. Olmsted?

A No, I didn't accept it as a true observation, and it was third or forth [sic] party and –

Q What do you mean it was "third or forth [sic] party"?

A Well, he heard it – as he told me, he heard it from somebody else who heard it from somebody where the weather was very foggy that spring, it was – it was part of the conversation that happens around the waterfront.

Q What kind of – can you describe what you – what kind of words would you use to describe that kind of conversation?

A Well, I do know Kit very well, but it is a little extra [35] conversation that does occur.

Q Well, is it reliable conversation or not reliable?

A No. He heard it from somebody and who did that person hear it from, and we hear a lot of things.

Q Now, what about the time of this conversation, do you recall when it was that it was made?

A It was in August.

Q Of what year?

A 1994.

* * *

[65] Q When I use the term, scuttlebutt, Mr. Packer, do you have a definition or understanding of that term?

A It's something to stay away from.

Q But you will agree there is a lot of scuttlebutt on the waterfront?

A There is a lot of scuttlebutt on all waterfronts.

Q And isn't it true that you had several conversations with several people between the summer of 1994 and June of 1997 when you filed the complaint regarding this incident?

[66] A I had – yes.

Q Can you detail briefly the conversations you had and identify the people you spoke with?

A I had conversations with Don Lynch of Sea Tow.

Q Where does Mr. Lynch reside?

A At Cuttyhunk Island.

And Charles Mitchell, I had a conversation with him.

Q And Mr. Mitchell operates the tug JAGUAR?

A Yes.

Q Is he the same person that you had previously used to tow your barges?

A Yes.

Q Any other conversations?

A With other people?

Q Yes, sir.

A Probably spoken with Jeff Linberg at various times on business, and then other activity in New Bedford.

Q My question is more pointed.

Who did you speak to during that time frame from the summer of '94 to the summer of '97 when your

attorney filed the complaint, and I'm specifically talking about Mr. Roy and the tug VENUS running aground on Middle Ledge?

A Kit Olmsted would be the third one.

Q What did Mr. Lynch tell you, if anything, about the [67] alleged incident?

A He said he heard something on the radio. He wasn't quite sure. We asked him a couple of times what it was, but it was just the waterfront news.

Q Waterfront gossip?

A Good term.

Q When did this conversation – when did the first conversation with Mr. Lynch take place?

A I'm not exactly sure.

Q Was it before or after the March 1995 inspection of the 500?

A It might have been before.

Q Now, can you tell us the substance of your conversations with Mr. Mitchell regarding the incident?

A He did let us know, or did say during the period of time that the VENUS was hauled at Fairhaven Shipyard for bottom damage that it had received.

Q Mr. Mitchell keeps his tugboat at the same marina as Mr. Roy?

A Yes.

Q And it happens to be Fairhaven Shipyard?

A Yes.

Q When did your first conversation with Mr. Mitchell take place regarding this incident?

A Sometime during the summer of 1994.

[68] Q And lastly, we have Mr. Olmsted, Kit Olmsted. Is it "K-I-T" or "K-I-T-T"?

A It's Christopher.

Q It's Christopher Olmsted, and his nickname is Kit, I guess?

A Yes.

Q What did Mr. Olmsted tell you?

A It was in August of '94.

Q Could it have been earlier?

A It could have been earlier. Could have been.

Q But you recall it was sometime in the summer of '94?

A Yes.

Q What did Mr. Olmsted tell you?

A Just the same thing I just said a few minutes ago.

There was – there was some points of information of what he had heard on the waterfront.

Q And Mr. Olmsted's a good friend of yours, isn't he?

A We worked together for a number of years.

Q And yet, what, if anything, did you do as a result of Mr. Olmsted's conversation with you that there was a possibility that one of your barges went aground with the VENUS?

A I said to him that I believe that Conrad Roy would have called me if he had a problem with the barge. I would be – it would be the responsibility on the towing vessel.

[69] Q Did you call Mr. Roy as a result of your conversation with Mr. Olmsted?

A No, I did not.

Q Did you see Mr. Roy from time to time at your facility in Vineyard Haven during the course of the next year?

A I'm not sure. I'm not sure I did or not. He might have come to the terminal over with a barge and departed, and I might have said, Hello.

Q Your office is within the terminal?

A Yes, it is.

Q Did you ever go aboard the VENUS and talk to Mr. Roy about the possibility that one of your barges went aground?

A No, I did not.

Q Did you ever ask to view the tug logbook?

A No, I did not.

Q Did you ever ask to speak to any of the crew on board the VENUS?

A No, I did not.

Q Did you ever hire a diver to inspect the bottom of the 500 as a result of your conversation with Mr. Olmsted?

A No, I did not.

Q It's fair to say that you did nothing, isn't it, sir, from the time you spoke with Mr. Olmsted until March of '95 when the Coast Guard inspected the barge?

A We did not make any inspections on the bottom during [70] that period.

* * *

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WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
RALPH PACKER				
By Mr. Farrell	6		99	
By Mr. Peloqun		51		110

* * *

[129] CERTIFICATE

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/ James P. Gibbons
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